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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 CR 861 (JMF)

5 ROBERT OLINS,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 March 22, 2016  
3:30 p.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York

17 CHRISTINE MAGDO

Assistant United States Attorney

18 DAY BERRY & HOWARD, LLP

Attorneys for Defendant

19 BY: STANLEY A. TWARDY

DANIEL E. WENNER

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(Case called)

MS. MAGDO: Good afternoon, your Honor. Assistant United State's Attorney Christine Magdo on behalf of the government. With me at counsel table is paralegal specialist Holly Meister.

THE COURT: Good afternoon.

MR. TWARDY: Good afternoon. Stanley Twardy, Day Berry, for Robert Olins. With me is my partner, Daniel Wenner from Day Berry.

THE COURT: Good afternoon to you.

I can't help but noticing that the person who is not with you is the defendant.

MR. TWARDY: Yes, your Honor. It is our understanding that this was a status conference. Mr. Olins was in a minor accident and asked whether or not he would need to be here. We looked at Federal Rule of Criminal Procedure 43(b)(3), which indicates that the defendant need not be present at a preliminary -- excuse me -- if the proceeding involves only a conference or a hearing on a question of law.

Today your Honor was to set a trial date and to argue on a pending motion. We did not see it in your Honor's rules that required the presence of the defendant for a proceeding like this.

THE COURT: Well, I have to say that's only because it has never come up that somebody even thought that the defendant

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1 could not appear at a conference in connection with his case,  
2 and especially where there is a motion pending and a trial date  
3 is going to be set, which is to say that this is, in my now  
4 13 years of experience as a prosecutor and judge, the first  
5 time I have encountered a situation where the defendant has not  
6 appeared without a lawyer seeking leave for that in advance of  
7 the conference.

8 I will tell you, if you had a good reason, I probably  
9 would have granted you leave, assuming that you would waive his  
10 presence, but I am not happy about it. Let's put it that way.

11 MR. TWARDY: Your Honor, we understand. And for that,  
12 we apologize. As I say, though, we looked at the rules, as I  
13 said, 43(b)(3) and --

14 THE COURT: Well, the rule says that a defendant need  
15 not be present, it doesn't say that a defendant can elect not  
16 to be present.

17 In my experience -- and this is one of those things I  
18 think it is just so obvious that no one has ever asked -- a  
19 defendant is required to appear at all court appearances unless  
20 given leave not to appear. This rule allows me to proceed  
21 where the defendant does not appear, if there is circumstances  
22 that might justify it and his presence is waived.

23 Be that as it may, we are where we are. He is not  
24 here. My intention is, assuming you would waive his presence,  
25 to proceed, but it is not going to happen again.

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1 MR. TWARDY: Your Honor, we apologize. It will not  
2 happen again. We will waive it.

3 We spoke to Mr. Olins about the trial dates. He  
4 understands what is going forward today, and it was his request  
5 not to do so. We will ask for the waiver.

6 THE COURT: One of the reasons that I do want the  
7 defendant here for setting of a trial date is that I make a  
8 practice of underscoring that, when I set a trial date, it is a  
9 firm date, and that everybody in the room understands that,  
10 including and especially the defendant, so that if there are  
11 any issues that might affect that, including issues with  
12 counsel, for example, that the defendant understands those need  
13 to be raised sooner rather than later.

14 I think what I will do, I will give my normal spiel  
15 and require you to order the transcript and provide it to the  
16 defendant, and then to file a letter affirming that the  
17 defendant has read it and understands and that there are no  
18 issues.

19 MR. TWARDY: We will do so, your Honor.

20 THE COURT: I will waive the defendant's presence.

21 I am prepared to rule on the motion.

22 This is a motion to strike surplusage from the  
23 indictment. I want to give you my ruling on that and then we  
24 can proceed.

25 The defendant moves, pursuant to Rule 7(d) of the

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1 Federal Rules of Criminal Procedure, to strike as surplusage  
2 various paragraphs from the indictment. The standard is well  
3 established, namely that, "motions to strike surplusage from an  
4 indictment will be granted only where the challenged  
5 allegations are not relevant to the crime charged and are  
6 inflammatory or prejudicial." That is from United States v.  
7 Mulder, 273 F.3d 91, 99 (2d Cir. 2001).

8 Measured against that standard, I am inclined to  
9 believe that -- I want to stress those words -- that most of  
10 the defendant's arguments are without merit. First, on the  
11 whole, I want to stress those words as well, the allegations  
12 concerning the disgorgement action appear to be relevant as  
13 background and/or as inextricably intertwined with the offenses  
14 charged. See Mulder at pages 99 to 100 (holding that  
15 statements providing background are relevant and need not be  
16 struck as surplusage). Second, defendant's arguments  
17 concerning his alleged false statements to the California court  
18 and the Dragon Candelabra allegations seem to me to depend on a  
19 mischaracterization and/or myopic view of the charges in the  
20 indictment, substantially for the reasons stated by the  
21 government in its memorandum of law.

22 The arguments with respect to the Dragon Candelabra in  
23 particular strike me as arguments that Mr. Olins may well want  
24 to make at trial with respect to his guilt or innocence, but I  
25 don't think that they are arguments about surplusage.

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1           Having said all of that, following what is common  
2 practice in this district, see, for example, United States v.  
3 Ulbricht, 2014 WL 5090039, at page 17 (S.D.N.Y. October 10,  
4 2014)(citing cases), I am not going to rule on the defendant's  
5 motion at this time. Instead, I deny the motion without  
6 prejudice to renewal at the conclusion of trial, when the  
7 government's evidence and theories will be unambiguous and  
8 spelled out.

9           The denial is also without prejudice to renewal of the  
10 arguments that defendant makes in the form of a motion in  
11 limine seeking to limit or exclude some evidence on Rule 401 or  
12 403 grounds or for that matter any other valid grounds for  
13 limiting or excluding evidence. In that regard, I should note  
14 that, in saying that the -- this is where my emphasis earlier  
15 comes in -- in saying that allegations concerning the  
16 disgorgement action appear to be relevant to me, I do not mean  
17 to suggest that, if I ultimately ruled to that effect, that the  
18 government would have carte blanche at trial to introduce any  
19 and all evidence concerning the disgorgement action and its  
20 origins. That is to say, I couldn't imagine limiting the  
21 evidence that the government could admit on that, so as to  
22 provide background, but without introducing evidence that would  
23 be unfairly prejudicial to the defendant. That is another way  
24 of saying that, even if evidence of the disgorgement action is  
25 generally admissible as background, and for that reason the

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1     allegations in the complaint are generally proper and not  
2     surplusage, Rule 403 may call for limiting the nature of that  
3     evidence and ultimately for striking some portions of the  
4     indictment, if I even submit it to the jury.

5             Deferring consideration of these issues strikes me as  
6     far preferable to ruling on them now in the context of this  
7     motion. For one thing, the issue may well become moot --  
8     because of a pretrial disposition and agreement between the  
9     parties or a decision by me not to provide a copy of the  
10    indictment to the jury. And if it doesn't become moot, I will  
11    have a much better and more developed record upon which to rule  
12    after or closer to trial than I do now.

13            So, for those reasons, the motion is denied, but  
14    without prejudice to renewal and in the manner that I have  
15    described.

16            I think, having resolved that, the main order of  
17    business is to set a trial date. Is there anything else to  
18    discuss before we do that?

19            MS. MAGDO: Not from the government, your Honor.  
20    Thank you.

21            MR. TWARDY: Not from the defense, your Honor.

22            THE COURT: Have you discussed a trial date?

23            Let me ask you, Ms. Magdo, how long would a trial in  
24    this matter take if it were to go to trial?

25            MS. MAGDO: Your Honor, the government's best estimate

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1 is that it would last somewhere between one and two weeks.

2 THE COURT: Is that estimate of the government's case  
3 in chief or --

4 MS. MAGDO: Of both sides.

5 We attempted to confer. We decided calling it one  
6 week might be cutting it a bit short. We would prefer to  
7 overestimate a little bit and to say one to two weeks.

8 THE COURT: Mr. Twardy.

9 MR. TWARDY: Yes, your Honor. We did talk with the  
10 government, and I think it is our understanding, my  
11 understanding, your Honor, that for trials, that you hold  
12 trials and cease in the afternoon. That is what had us to the  
13 point that if this were a nine-to-five trial, that it might be  
14 five or six days, but given your Honor, as I know, has a very  
15 tight schedule but does have the afternoons off, we are  
16 concerned about a little bit of leakage.

17 THE COURT: That's fine.

18 In my experience, I end up getting almost as much  
19 trial time in in a week as a judge sitting the more  
20 conventional schedule, in part because most of those judges  
21 don't sit five days a week. I do sit five days a week,  
22 typically the 9:00 to 2:30 schedule with one half-hour break.

23 When were you thinking of having trial, to the extent  
24 that I can accommodate?

25 MS. MAGDO: After conferring, we found that the



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1 parties were all available the week of May 23 and into the  
2 following week, if necessary.

3 THE COURT: I am not available May 23. I think we are  
4 going to find it is hard to find any judge who is available  
5 that week. I am on part one the following two weeks.

6 MS. MAGDO: From the government's perspective, we  
7 could do anytime in May and June. In July our agents are on  
8 other trials, but we could, if necessary, work around that.

9 THE COURT: Mr. Twardy.

10 MR. TWARDY: Yes, your Honor.

11 The only problem that the defendant has -- it is not  
12 the defendant, it is myself -- I have a longstanding trip to  
13 England. I leave on Friday, the 10th, and return on Monday  
14 afternoon, the 20th of June. If I had a little bit of time to  
15 get reacclimated hour wise, anytime after that we could go.

16 If I might suggest starting the week of June 27?

17 THE COURT: Ms. Magdo, you indicated the agents had  
18 some issues come July?

19 MS. MAGDO: Yes. I think that would work. The only  
20 question is whether there is any issue with it being over the  
21 long weekend, the 4th of July weekend. We will just include  
22 that in our questions to the jurors.

23 THE COURT: Obviously, we couldn't sit on July 4, it  
24 being a court holiday.

25 I think I will set it down for trial on June 27. This

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1 is where my warning comes in. Everyone should understand that  
2 that is a firm date. Barring something pretty extraordinary,  
3 assuming that the case is not otherwise disposed of, we will  
4 begin trial on June 27.

5 What that means, as I more or less already indicated,  
6 is that if there is anything that could affect that trial date,  
7 whether it be an issue related to discovery, whether it be some  
8 sort of motion, whether it be an issue, as I said, between the  
9 defendant and counsel, it is incumbent upon you to raise it  
10 sooner rather than later. The closer we get to the trial date,  
11 the more likely it is we deny the application that could have  
12 an effect on the beginning of trial.

13 Do you understand that, Ms. Magdo?

14 MS. MAGDO: Yes. Thank you, your Honor.

15 THE COURT: Mr. Twardy.

16 MR. TWARDY: Yes.

17 THE COURT: You'll order the transcript and file a  
18 letter indicating the defendant has read it and understands as  
19 well?

20 MR. TWARDY: Yes, your Honor.

21 THE COURT: My normal practice is about two months  
22 prior to trial, so that would be the end of April, I'll issue a  
23 scheduling order that sets a deadline for the following of a  
24 final pretrial conference and any motions in limine, request to  
25 charge, and the like.

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1           Mr. Twardy, let mind me, for purposes of that order,  
2           you're back on the 20th of June?

3           MR. TWARDY: I'll be back on the 20th, yes, your  
4           Honor, of June.

5           THE COURT: The final pretrial conference is likely to  
6           be sometime during that week closer to the end of that week.

7           MR. TWARDY: That's fine.

8           THE COURT: I will do that.

9           Ms. Magdo, is there an application with respect to the  
10          speedy trial clock?

11          MS. MAGDO: Yes, your Honor.

12          The government moves to exclude time pursuant to  
13          3161(h) in the interest of justice. I may be getting the  
14          section wrong. We move to exclude time.

15          THE COURT: It used to be (h). I think it still is  
16          (h).

17          Any objection?

18          MR. TWARDY: No, your Honor.

19          THE COURT: I will exclude time between today and  
20          June 27, 2016. I find that ends of justice served by excluding  
21          that time outweigh the interest of the public and the defendant  
22          in a speedy trial, to allow the parties to prepare for trial,  
23          but more importantly, in light of defense counsel's scheduling  
24          issues, to allow for the continuity of counsel.

25          Is there anything else we should discuss?

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1 MS. MAGDO: Not from the government. Thank you.

2 THE COURT: Mr. Twardy.

3 MR. TWARDY: Not from the defense, your Honor. And I  
4 apologize.

5 THE COURT: Well, I appreciate that. Apology  
6 accepted.

7 Thank you very much. Have a good day.

8 (Adjourned)

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